UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:	)	
JESUS PENA	)	
LEONOR PENA	)	BANKRUPTCY NO: 09-20541
Debtors	)	

MEMORANDUM OPINION, DECISION
AND
ORDER[1]

I
Statement of Proceedings

The Court takes judicial notice of the following as set out in the record of the Debtors' case.[2] On February 23, 2009, Jesus Pena and Leonor C. Pena ("Debtors") filed a joint Chapter 13 Petition under the above-captioned case number (Docket No. 1). In that their Chapter 13 Petition was filed on

[1] This Memorandum Opinion and Order constitutes the Court's Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52(a) as made applicable by Fed. R Bk. P. 9014(c) and Fed. R. Bk. P. 7052.

[2] Federal Rule of Bankruptcy Procedure 9017 provides that the Federal rules of Evidence apply in cases under the Code. See also, Fed. R. Evid. 1101(a) and (b). Federal Rule of Evidence 201 provides that the Court, whether or not requested, may take judicial notice of adjudicative facts at any stage of the proceedings. Federal Rule of Evidence 201 is the only evidentiary Rule on the subject of judicial notice.

This Court has held in In re Snider Farms, Inc., 83 B.R. 977, 986 (Bankr. N. D. Ind. 1988), citing, In re Woodmar Realty, 294 F.2d 785, 788 (7th Cir. 1961), cert. den. 369 U. S. 803, 82 S. Ct. 643, 7 L. Ed.2d 5550 (1962), that a bankruptcy court is duty bound to take judicial notice of its records and files. See, Frierdich v. Mottaz, 294 F.3d 864, 870 (7th Cir. 2002) (bankruptcy judge did not err by taking judicial notice of schedules filed by debtor in main case in §548(a)(1) adversary proceeding); State of Florida Board of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975) (not error for a bankruptcy court to take judicial notice of related proceeding and records in cases before a court); In re E. R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989) (the Court may take judicial notice of the file and record in the underlying case). See also, Green v. Warden, U. S. Penitentiary, 699 F.2d 364, 369 (7th Cir. 1983) (a Court may take judicial notice of its own Court documents and records).

The Court is aware that there is a very crucial distinction between taking judicial notice of the fact that an entity has filed a document in the case, or in a related case, on a given date, i.e., the existence thereof, and the taking of judicial notice of the truth or falsity of the contents of any such document for the purposes of making a finding of fact. However, the verified Schedules and Statements filed by a debtor are not just pleadings, motions, or exhibits thereto. They are evidentiary admissions. In re Cobb, 56 B.R. 440, 442 n. 3 (Bankr. N. D. Ill 1985). See Fed. R. Evid 801(d)(2) (Admission by a party opponent not hearsay). See, e.g. In re Habiballa, 337 B.R. 911, 917 (Bankr. E. D. Wis. 2006), In re Smith, 325 B.R. 498, 503 Bankr. D. N. H. 2005), Larson v. Groos Bank, N.A., 204 B.R. 500, 502 (1996), In re Leonard, 151 B.R. 639, 643 (Bankr. N. D. N.Y 1992). In re Davis; 108 B.R. 95, 99 (Bankr. D. Md. 1989).

February 23, 2009, their case is controlled by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which applies prospectively to all cases filed on or after October 17, 2005 ("BAPCPA"). In re Sidebottom, 430 F.3d 893, 897 n. 2 (7th Cir. 2005).

The Debtors on March 25, 2009, filed their Schedule I - Current Income of Individual Debtor(s) and Schedule J - Current Expenditures of Individual Debtor(s) (Docket No. 11). On Schedule I at Line 16, the Debtors stated their Combined Average Monthly Income is $5,489.08. On Schedule J, at Line 18, the Debtors stated their Average Monthly Expenses are $3,531.17. On Line 20.C. of Schedule J the Debtors stated their Monthly Net Income is $1,957.91, by subtracting Line No. 20.b. from Line 20.C.

The Debtors on March 25, 2009 filed a Chapter 13 Plan ("Plan") (Docket No. 14), and on March 25, 2009 filed a Chapter 13 Form B22C Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income ("B22C Statement") (Docket No. 19).

The Plan filed by the Debtors provided at Paragraph 1 that the Debtors would make Plan payments to the Trustee in the sum of $451.83 weekly, for a total of Plan payments to be paid being $70,484.00. The sum of $451.83 weekly, results in a Plan payment on a monthly basis of $1,955.56.

Paragraph 2 of the Plan states that the estimated length of the Plan is 36 months. Paragraph 4.d.(2) of the Plan provided that from the payments received under the Plan, the Trustee shall make disbursements to General Nonpriority Unsecured Creditors in the amount of $8,108.05 pro rata. The Claims Register maintained by the Clerk reveals that the General Nonpriority Unsecured Creditors of the Debtors filed Claims versus the Debtors' estate totaling $49,986.84. No. objections were filed by the Debtors to those Claims, and the if Claims were executed and filed in accordance with the Bankruptcy Rules they shall constitute prima facia evidence of the validity and amount of the Claims pursuant to Fed. R. Bk. P. 3001(F).

The B22C Statement filed by the Debtors at Part II, Calculation of §1325(b)(4) Commitment

Period, at Line No. 15, listed an Annualized Current Monthly Income for §1325(b)(4) of $79,662.00. Line 16 thereto, Applicable Median Family Monthly Income for the Debtors' household, with a size of 4, as Indiana Residents, was shown as being $67,911.00. Line 17, Application of §1325(b)(4), provides that if the amount on Line 15 is not less than the amount on Line 16, the Debtors were instructed to check the box for "The Applicable Commitment Period is 5 years" at the top of Page 1 of the B22C Statement. Line No. 15 not being less than Line No. 16, the Debtors were instructed to check the box stating that "The applicable commitment period is 5 years" at the top of Page 1 of the B22C Statement. This was done by the Debtors, notwithstanding the fact that the Plan of the Debtors states the Plan term was only 36 months.

At Part V of the B22C Statement, Determination of Disposable Income Under §1325(b)(2), at Line 59, the Debtors stated that their Monthly Disposable Income under §1325(b)(2) was a negative amount of $258.97 a month, arrived at by subtracting Line No. 58, Total Adjustments to Determine Disposable Income, in the sum of $6,897.47 from Line No. 53, Total Current Monthly Income, in the sum of $6,638.50.

Thus, despite the fact that the Debtors' own calculations in their B22C Statement, as Above-Median Family Income Debtors, resulted in a required Plan Commitment Period of 5 years pursuant to §1325(b)(4), the Debtors' Plan is estimated by them to be only 36 months in length, and proposes to pay General Nonpriority Unsecured Creditors a dividend of only $8,108.05, when the total General Nonpriority Unsecured Claims that were filed versus the Debtors' estate were $49,986.84.

II

Issue to be Decided

On July 28, 2009, a Status Conference was held as to the Confirmation of the Plan. The Trustee reported to the Court that he objected to the Debtors' Plan as not being confirmable, in that a proposed

Plan length of an estimated 36 months by the Debtors as Above-Median Family Income Debtors did not comply with the 5 year commitment period required by §1325(b)(4), as set out in the Debtors' B22C Statement, in that the Debtors' Plan does not propose to pay a 100% dividend to the allowed General Nonpriority Unsecured Creditors.

The Debtor reported to the Court that inasmuch as Part V, Line No. 59 of the Debtors' B22C Statement resulted in monthly disposable income under §1325(b)(2) in a negative amount of $258.97, a Plan that had a 36 month commitment period, or plan length, was confirmable notwithstanding the fact that General Nonpriority Unsecured Creditors would not be paid in full.

The Trustee had no objection to the accuracy, propriety, or reasonableness of the computations by the Debtors in their B22C Statement. The Trustee and the Debtors did not raise any factual issues as to this contested matter, and by Order dated August 12, 2009 (Docket No .43), the Trustee and the Debtors Stipulated there was no need for the submission of evidence, as this contested matter involved questions of law only, and that this contested matter would be submitted as an Agreed Case without an evidentiary hearing.

The sole legal issue that was briefed by the parties, is whether the above-median family income Debtors can have their proposed Plan confirmed, which provides for less than a 100% dividend to General Nonpriority Unsecured Creditors, and an estimated Plan length of 36 months, when their B22C Statement, based on the Debtors' own computations as above-median family income debtors produces a 5 year Plan Commitment Period pursuant to §1325(b)(4), and a negative Monthly Disposable Income under §1325(b)(2) in the sum of $258.97.

The Trustee on September 23, 2009 filed his Memorandum in Support of the Trustee's Position That An Above Medium Debtor Cannot Propose a Plan Which Is Less Than Five Years Absent a 100% Repayment Plan to All Unsecured Creditors (Docket No .45).

The Debtors on September 25, 2009 filed their Memorandum of Law in Support of Confirming a Three (3) Year Plan, When The Applicable Commitment Periods is Five (5) Years which was amended on November 10, 2009 to correct some citation errors.

By Order of the Court dated October 15, 2009, the Court approved a Stipulation of the parties that no response briefs would be filed, and that the Court decide the issue based on the initial Memorandums submitted by them. (Docket No. 48).

III

The Position of the Trustee

The Trustee's Memorandum asserts that §1325(b)(4), which was added to the Bankruptcy Code by BAPCPA, is plain and unambiguous, and that this Court should adapt the "temporal application" and reject the "monetary" approach in construing §1325(B)(4), citing In re Schanuth, 342 B.R. 601, 603-04 (Bankr. W. D. Mo 2006); In re Brown, 396 B.R. 551, 554 (Bankr. D. Colo 2008); In re Wiggs, 2006 WL 2246432 *3 (Bankr. N. D. Ill 2006); In re Davis, 348 B.R. 449, 458 (Bank E. D. Mich 2006); In re Dew, 344 B.R. 655,661 (Bankr. N. D. Ala 2006); and, In re Crume, Case No. 06-30218, P. 6 (Bankruptcy Court Northern District of Indiana, South Bend Division), in support of his position.

IV

The Position of the Debtors

The Debtors' Amended Memorandum asserts that because their B22C Statement Computations produce a negative Monthly Disposable Income under§1322(b)(2), the Debtors can have their 36 month Plan confirmed, notwithstanding the fact that their B22C Statement shows they are above-median family income debtors, whereby the commitment period pursuant to§1325(b)(4) is 5 years, in that since they have no Monthly Disposable Income, there is no benefit to General Nonpriority Unsecured Creditors by requiring a Plan that exceeds the 3 years proposed by the Debtors.

The Debtor cites the following cases in support of their position: In re Kagenveama, 541 F.3d 868 (9th Cir. 2008) (Opinion 527 F.3d 890, amended and superseded); In re Alexander, 344 B.R. 742 (Bankr. E. D. N. C. 2006); In re Mathis, 367 B.R. 629 (Bankr. N. D. Ill. 2007); and , In re Fuger, 347 B.R. 94 (Bankr. D. Utah, 2006).

V

Conclusions of Law
and
Discussion

No Objection was made by counsel to the subject-matter jurisdiction of this Court as to this matter. The Court finds subject-matter jurisdiction to be present, pursuant to 28 U.S.C. §1334(b), and that this contested matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2).

Section 1325(b)(1)of the BAPCPA states as follows:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—
(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
(B) the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors und the plan (emphasis supplied).

Section 1325(b)(4) of the BAPCPA states as follows:

(4) For purposes of this subsection, the 'applicable commitment period'—

(A) subject to subparagraph (B), shall be—
(I) 3 years; or
(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—
(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
(ii) not less than 5 years, if the current monthly income of the debtor and the debtor's spouse combined, when multiplied by 12, is not less than—
(I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
(III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus $575 per month for each individual in excess of 4; and

(B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A) but only if the plan provides for payment in full of all allowed unsecured claims for a shorter period (emphasis supplied).

The term "current monthly income", as set out in §1325(b)(4)(A)(ii), is defined in its relevant part at §101(10A) as follows:

(10A) The term "current monthly income"—
(A) means the average monthly income from all sources that the debtor receives (or in a joint case the debtor and the debtor's spouse receive) without regard to whether such income is taxable income, derived during the 6-month period ending on—
(I) the last day of the calendar month immediately preceding the date of the commencement of the case if the debtor files the schedule of current income required by section 521(a)(1)(B)(ii); or
(ii) the date on which current income is determined by the court for purposes of this title if the debtor does not file the schedule of current income required by section 521(a)(1)(B)(ii),...

Bankruptcy Rule 1007(b)(6) schedules, statements, and other documents required, provides that a debtor in a Chapter 13 case, unless the Court orders otherwise, shall file, as prescribed by the appropriate Official Form, a Statement of Current Monthly Income, prepared as prescribed by the appropriate Official Form, and if the Current Monthly Income exceeds the Median Family Income for the applicable State and household size, a calculation of disposable income made in accordance with §1325(b)(3), prepared as prescribed by the appropriate Official Form. This is Official Bankruptcy Form B22C., the B22C Statement discussed above.

This Court has not had the occasion to decide the precise legal issue before it. In the case of In re Meadows, 410 B.R. 242 (Bankr. N. D. Texas), that Court noted as follows:

Three lines of authorities have developed. The first line of authorities holds that the

> phrase "applicable commitment period" is temporal and, thus, requires above-median-income debtors to pay their creditors in full or commit to a plan whose term is sixty months in length. In re Nance, 371 B.R. 358, 369 (Bankr. S. D. Ill 2007); In re Grant, 364 B.R. 656, 667 (Bankr. E. D. Tenn. 2007); In re Slusher, 359 B.R. 290, 305 (Bankr. D. Nev. 2007); In re Casey, 356 B.R. 519, 527 (Bankr. E. D. Wash. 2006); In re Schanuth, 342 B.R. 601, 607 (Bankr. W. D. Mo 2006).
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> The second line of authorities adopts the multiplier approach that the debtor urges this court to follow. The advocates of this approach say that the function of the "applicable commitment period" is to provide a factor by which the debtor's projected disposable income must be multiplied in order to determine the amount of the unsecured creditors' pool. In re Lopatka, 400 B.R. 433, 440 (Bankr. M. D. Pa 2009); In re Swan, 368 B.R. 12, 27 (Bankr. N. D. Cal. 2007); In re Mathis, 367 B.R. 629, 634 (Bankr N. D. Ill. 207); In re Brady, 361 B.R. 765, 776 (Bankr. D. N. J. 2007); In re Fuger, 347 B.R. 94, 95 (Bankr. D. Utah 2006). Under this approach, the function of the "applicable commitment period" is fulfilled as long as the debtor proposes a plan that pays the pool amount, even if the plan term is less than sixty months and the plan does not satisfy claims in full.
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> The third line of cases focuses upon the language of section 1325(b)(1)(B). It notes that that section only requires that the debtor's projected disposable income during the "applicable commitment period" be applied to payments to unsecured creditors. 11 U.S.C. §1325(b)(1)(B). According to this line of authorities, if the debtor has no projected disposable income, the concept of an "applicable commitment period" never comes into play. See In re Kagenveama, 541 F.3d 868, 876 (9th Cir. 2008); Musselman v. eCast Settlement Corp., (In re Musselman), 394 B.R. 801, 814 (E. D. N. C. 008); In re Davis, 392 B.R. 132, 148 (Bankr. E. D. Pa. 2008); In re Alexander, 344 B.R. 742 (Bankr. E. D. N. C. 2006).
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> Notwithstanding their disparate results, the foregoing cases have some similarities. First, they typically purport to follow the ("plain" or "natural" language of section 1325(b). In re DeThample, 390 B.R. 716, 722 (Bankr. D. Kan. 2008); See In re Davis, 392 B.R. 132, 138 (Bankr. E. D. Pa. 2008). Second, they find support for their respective positions in BAPCPA's legislative history. See In re Davis, 392 B.R. at 137-38. And, third, they frequently point to incongruous results that would flow from adopting a contrary ruling. Id.

Id. 410 B.R. at 244-45.

The Court concludes that in deciding the precise issue before the Court regarding the required length of the Applicable Commitment Period pursuant to §1325(b)(4) for a debtor with an above-median family income and a negative monthly disposable income on his or her B22C Statement, it must first decide if the "mechanical approach" or the "forward looking approach" should be applied in

determining the Debtors' projected disposable income pursuant to §1325(b)(1)(B), in that there appears to be a substantial and artificial disconnect that must be reconciled between the historical approach applied in determining the Debtor's Monthly Disposable Income under §1325(b)(2) found at Line No. 59 of the B22C Statement, which could be a negative figure, as in the case before the Court, and the Debtors' projected actual disposable income looking forward during the course of the administration of the Debtors' Plan, which could be a positive figure.

In the case of In re Kagenveama, 541 F.3d 868, 876 (9th Cir. 2008), cited by the Debtors, the Chapter 13 Trustee objected to Confirmation of a 36 month plan proposed by an above-median income Debtor, both on the grounds that the Debtor was not devoting all her "projected disposable income" to the payment of unsecured creditors, and on the grounds that the Debtor, as an above-median income debtor, could not propose a plan that was less than 60 months. The court in Kagenveama, rejected the trustee's arguments that §1325(b)(1)(B) requires a forward-looking determination of "projected disposable income:" and that the calculation of "disposable income" under §1325(b)(2) is merely a starting point for deriving "projected disposable income". Id. 541 F.3d at 873-876. Thus, in the Ninth Circuit disposable income is determined pursuant to the "historical" or "mechanical approach" based on the Form B22C Statement filed by the debtor rather than the "forward-looking" approach as discussed below. Id. 541 F.3d at 872-73. The Court also held that where there is no "projected disposable income" pursuant to §1325(b)(1)(B), there is no "applicable commitment period". Thus, the "applicable commitment period" applies only to plans that feature "projected disposable income", and in that case there was none. Id. 541 F.3d at 876.

The Ninth Circuit in In re Kagenveama, is the only Circuit that has adopted the "mechanical approach". See, In re Lanning, 545 F.3d 1269, 1276-78 (10th Cir. 2008), discussing Kagenveama,

and adopting the "forward-looking" approach.[3] See also, In re Fredrickson, 545 F.3d 652, (10th Cir. 2008), which also rejected Kagenveama, and held that the "projected disposable income" is not simply the debtor's historically-based "disposable income" projected forward over the applicable commitment period, and while the debtor's historically-based "disposable income" is a starting point for determining "projected disposable income", the Court can take into consideration changes that have occurred in the debtor's financial circumstances as well as the debtor's actual income and expenses as reported on the debtor's schedules. Id. 545 F.2d 658-661. The Fifth Circuit in the case of In the Matter of In re Nowlin, 576 F.3d 258 (5th Cir. 2009), also adopted the "forward-looking approach", in interpreting the phrase "projected disposable income" in §1325(b)(1) as to above-median Chapter 13 debtors, citing the Eighth Circuit in In re Fredrickson, Supra and the Tenth Circuit in In re Lanning, Supra, with approval, and rejecting the Ninth Circuit's Opinion in In re Kagenveama, Id. 576 F.3d at 263-67.

In the recent case of In re Turner, 574 F.3d 349, (7th Cir. 2009), the Seventh Circuit, also rejected the Ninth Circuit Opinion in Kagenveama, and adopted the holdings of the Eight Circuit in In re Fredrickson, 545 F.3d at 659-60 and the Tenth Circuit in In re Lanning, 545 F.3d at 1278-82, Supra, and decided that while the calculation of "disposable income" in the plan submitted by the debtor is a starting point for determination of the debtor's "projected disposable income", the final calculation can take into consideration changes that have occurred in the debtor's financial circumstances. Id. 574 F.3d at 354-356. The Turner Court also held since the debtor's plan provided for an abandonment of his residence subject to a mortgage that the mortgage payment would

[3] The Supreme Court has recently granted Certiorari to decide the issue in In re Lanning, cert. granted ____ U. S. ____, 130 S. Ct. 487, ____ L. Ed.2nd (2009).

"vanish" before the plan would take effect, that mortgage payment could not be used as a deduction in calculating a debtor's disposable income. Id. 574 F.3d at 355-56. The Court in Turner stated as follows:

> For some purposes for example determining whether the debtor is eligible for a Chapter 13 bankruptcy-his financial situation on the date of the filing of the declaration of bankruptcy will govern in order that the right procedural vehicle (for example, whether it should be Chapter 13 or Chapter 7) can be determined at the outset.
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> This approach is consistent with the principle that jurisdiction is determined by the facts as they exist when a case is filed and is unaffected by a subsequent change in those facts, such as a change of the state of residence by a party to a diversity suit.
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> But that is not a problem in this case; Turner's eligibility to proceed under Chapter 13 is not in question.
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> Since the object of a Chapter 13 bankruptcy is to balance the need of the debtor to cover his living expenses against the interest of the unsecured creditors in recovering a much of what the debtor owes them as possible, we cannot see the merit in throwing out undisputed information, bearing on how much the debtor can afford to pay, that comes to light between the submission and approval of a plan of reorganization. Sometimes, as in this case, the creditors will benefit from the new information. But in other cases it will be the debtor, In re Solomon, supra, 67 F.3d at 11-30-31; In re Kibbe, 361 B.R. 302, 314 (1st Cir. BAP 2007) (per curiam); In re Petro, 395 B.R. 369, 376 (6th Cir. BAP 2008), because the expenses that are deductible in determining his disposable income are as likely to rise unexpectedly between the dates of submission and approval as to fall (and his income, as in Kibbe and Petro, is as likely to fall as to rise).
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> The use of the later date which is consistent with the statutory language though not compelled by it is more sensible. Cf. Kawitt v. United States, 842 F.2d 951, 953 (7th Cir. 1988); City of Stilwell v. Ozarks Rural Electric Cooperative Corp., 166 F.3d 1064, 1072 (10th Cir. 1999) We therefore agree with the Eight Circuit in In re Frederickson, 545 F.3d 652, 659-60 (8th Cir 2008), that while the calculation of "disposable income" in the plan submitted by the debtor "is a starting point for determining the debtors' projected disposable income, the final calculation can take into consideration changes that have occurred in the debtor's financial

> circumstances." To the same effect, see, in re Lanning, 545 F.3d 1269, 1278-82 (10th Cir. 2008). In re Kagenveama, supra, 541 F.3d at 873-74, is to the contrary.

Id. 574 F.3d at 355-56. (emphasis in original).

The Tenth Circuit in In re Lanning decided that the reading of three phrases in §1325(b)(1)(B) lead to the conclusion that the "mechanical" approach is incorrect. These three phrases are "as of the effective date of the plan", "to be received in the applicable commitment period" and "will be applied to make payments to unsecured creditors under the plan". The Lanning Court stated:

> Under §1325(b)(1)(B), a bankruptcy court may not approve a Chapter 13 plan over objection unless "as of the effective date of the **Plan"** the plan "provides that all the debtor's projected disposable income **to be received in the Applicable Commitment Period** beginning on the date that the first payment is due under the plan **will be applied to make payments** to unsecured creditors under Plan" (Emphasis added). The first emphasized phrase "as of the effective date of the plan," indicates that the court should determine, at that time, whether the plan meets the remaining requirements of subparagraph (b)(1)(B). The term "effective date" is not defined in the Bankruptcy Code, but for purposes of §1325(b)(1), "the most logical interpretation ... is the date of the plan confirmation, as a chapter 13 plan is not binding on the debtor and other interested parties until it is confirmed." In re Pak, 378 B.R. at 265 (relying on 11 U.S.C. §1327(a)), abrogated on other grounds by In re Kagenveama, 541 F.3d 868. The date of plan confirmation is practically certain to be later than the date on which the petition is filed, and it is the filing date that starts the backward-looking assessment of "current monthly income". Thus, determining whether or not a debtor has committed all projected disposable income to repayment of the unsecured creditors "as of the effective date of the plan" suggests consideration of the debtor's actual financial circumstances as of the effective date of the Plan.
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> [under] the forward-looking approach "projected" links "disposable income" and "to be received in the applicable commitment period," requiring the debtor to commit all "disposable income" (as defined by §1325(b)(2) and its reliance on the definition of "current monthly income") that is "projected ... to be received in the applicable commitment period." Under this reading, the debtor's actual circumstances at the time of plan confirmation are taken into account in order to "project" (in other words, to "forecast") how much income the debtor will actually receive during the commitment period, which, after deducting permitted expenses, then will be applied to make payments" to the unsecured creditors, as the statute requires.

Id. 545 F.3d at 1279. (emphasis in original).

The Lanning Court also stated as follows:

> In addition, language used on Form B22C supports the forward-looking approach. Part VI of Form B22C is titled "Determination of Disposable Income Under §1325(b)(2).... Similarly, the last line in Part VI of the form is termed "Monthly Disposable Income Under §1325(b)(2)."... Although the form is subservient to the statute, see In re Pak, 378 B.R. at 271 (concurring opinion), abrogated on other grounds by In re Kagenveama, 541 F.3d 868, the absence of the word "projected" and any reference to the phrase "projected disposable income" are consistent with the forward-looking approach. fn8
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> > FN8 Committee notes on the bankruptcy rules also support the forward-looking approach. See 11 U.S.C. App'x-Bankruptcy Rules, Committee Notes on Rules-2005, D.3., at 230 (explaining that the check box on Form B22C that indicates whether "the applicable commitment period under §1325(b)(3) to be used in determining the debtor's disposable income" is "intended to inform standing trustees and others interested parties about these items, but does not prevent the debtor from arguing that the calculations required by the form do not accurately reflect the debtor's disposable income:).

Id. 545 F.3d at 1280 (Footnote 8 included).

This Court agrees with the above analysis of §1325(b)(1)(B) by the Court in Lanning. The decision rendered there, along with the decision of the Seventh Circuit in Turner, leads this Court to the conclusion that the "forward looking approach", rather than the "historical" or "mechanical approach" requires that an Above-Median Family Income Debtor with negative monthly disposable income on Line 59 of the B22C Statement must propose a plan with a commitment period of five years.

While the Seventh Circuit's adoption of the "forward-looking approach" in Turner, as opposed to the "mechanical approach", as to what constitutes "projected disposable income" does not directly resolve the issue before the Court as to how the "applicable commitment period" is determined pursuant to §1324(b)(4), it is clear that based on Turner, the Court is not bound by what Line 59 of the Debtors' B22C Statement shows as to what their Monthly Disposable Income is on a "mechanical" or "historical" basis. Accordingly, the Court may also look to the Debtors' Plan, Schedules I and J, which set out the Debtors' present and actual postpetition income and expenses

going forward. In addition, various Motions and Objections may be filed by the Debtors, the Trustee, or the Creditors, after the Petition date which may indicate increases in income and the reduction of expenses, as well as Schedules D, E, and F, which may reflect debts that may be paid in full by the Debtors' plan by the 36th month or last month of the plan, or unencumbered non-exempt assets whereby pursuant to the §1325(a)(4) "best interest of creditors test", unsecured creditors may then receive a substantial dividend in Plan Commitment years four and five.

As observed by the Court in In re Fredrickson, the historical calculations in the debtor's B22C Statement do not take into consideration a debtor's current financial situation, which may have changed substantially between the point in time between the filing of the bankruptcy petition and the point in time when the debtor's Chapter 13 plan is proposed. These changes could be the result of inter alia, a promotion at work, the loss of a job, the acquiring of a second job, or increased medical expenses. Id. 545 F.3d at 658-659.

The Court can easily envision numerous factual scenarios that might reasonably be projected to transpire after the Petition date as to an above-median family income debtor with a negative monthly disposable income on his or her B22C Statement, wherein the projected disposable income of a debtor may increase based on a promotion, a raise, overtime, or a second job, or expenses may decrease, based on a reduced size of the household or the surrender of collateral to a secured creditor, in applying the "forward-looking" approach adopted by the Seventh Circuit in Turner. Any such increase in disposable income or reduction in expenses between the Petition date and the date of the confirmation hearing could, in turn, increase the monies available for distribution by the trustee to general nonpriority unsecured creditors, not only in a plan with a three year commitment period, but also during years four and five of a plan with a five year commitment period, if the Court should require a five year commitment period, even though the above-median family income debtor's B22C Statement reveals

that she or he has negative monthly disposable income on a historical basis.

For instance, upon the objection by the Trustee or any unsecured creditor to the debtor's plan, the Court might find that the proposed payment of a secured claim is not reasonably necessary for the maintenance or support of the debtor, or a dependant of the debtor, pursuant to §1325(b)(2)(A), thus requiring that the debtor either surrender or abandon the collateral or amend the plan, thereby increasing the dividend to unsecured creditors. See e.g. In re Hedges, 68 B.R. 18, 20-21 (Bankr. E. Va 11986), (recreational boat); In re Gibson, 142 B.R. 879, 881-82 (Bankr. E. D. Mo 1992) camper), In re Lindsay, 122 B.R. 157, 158 (Bankr. M.D. Fla 1991) (mortgage on nonresidential investment real estate); In re Brooks, 241 B.R. 184, 186-87 (Bankr. S. D. Ohio 1999) (motor home). See also Lundin, Chapter 13 Bankruptcy (3rd Ed.) Vol. 2 §165.1

The above-median family income debtor with a negative monthly disposable income pursuant to the B22C Statement may decide subsequent to the Petition date and the filing of the B22C Statement that he or she cannot, or should not, assume a motor vehicle lease pursuant to §365 because it is not feasible to either pay the regular postpetition lease monthly installment, cure the prepetition arrears, or both. The lessor may also file a motion that the debtor assume or reject the lease, and the debtor will be forced to reject the lease for the reasons stated above. Thus, possibly increasing the dividend to unsecured creditors in the amount of the proposed lease payment.

It may well be that the above-median family income debtor with a negative monthly disposable income pursuant to the B22C Statement has a loan or has loans that will be paid in full within three years of the plan term pursuant to the provisions of the debtor's plan, such as a 401(k) loan. Upon payment of any such loan, applying the "forward looking" approach of Turner, any such debtor could be compelled to devote the plan payments previously allocated to fully retiring the 401(k) loan to dividends to unsecured creditors during a five-year commitment period. See e.g. In re Laskowski, 575

F.3d 815, 819-820 (8th Cir 2009) (citing In re Fredrickson, 545 F.3d 652, 659 (9th Cir. 2000)); In the Matter of Nowlin, 576 F.3d at 267.

Subsequent to the Petition date and the filing of the B22C Statement, the above-median family income debtor with negative monthly disposable income may realize it is not feasible to provide for and fund a plan payment on residential rental or investment property or a second motor vehicle, and either amend the plan to abandon and surrender the same, or upon the filing of a motion for stay relief and to abandon by a secured creditor, such a debtor may consent to an order granting the motion. As a consequence, the plan payments originally proposed to be made to any such secured creditor could be allocated to a dividend to general unsecured creditors.

Pursuant to § 1306, postpetition property of the debtor is property of the debtor's estate. Postpetition income tax refunds are property of a Chapter 13 debtor's estate and must be applied to plan payments to general unsecured creditors. In re Fredrickson, 86 F. 3d 478, 481 (6th Cir. 1996). The above-median family income debtor with a negative monthly disposable income may have postpetition income tax refunds in the fourth and fifth years of a plan in addition to the first 36 months of a plan that could be applied to dividends to general unsecured creditors.

The debtor may have a prepitition personal injury claim or a workman's compensation claim that if settled postconfirmation, which may constitute disposable income to be applied to class of unsecured creditors. See e.g. In re Watters, 167 B.R. 146, 147-148 (Bankr. S. D. Ill 1994); In re Baines, 263 B.R. 868, 871 (Bankr. S. D. Ill 2001).

The above factual scenarios are certainly not intended to be exhaustive, all-inclusive illustrations of what quite often transpires in a typical Chapter 13 case, whereby the dividend to unsecured creditors may increase arising out of a postpetition event, but are certainly typically and commonly found in many Chapter 13 cases.

It is also noted that a plan may be modified postconfirmation. See §1329 and Fed. R. Bk. P. 3015(g). Section 1329 states, in part, as follow:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan my be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—
> (1) increase or reduce the amount of payments on claims of a articular class provided for by the plan:
> (2) extend or reduce the time for such payments;
> (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of nay payment of such claim other than under the plan; or....(emphasis supplied).

The Seventh Circuit in the case of In re Witkowski, 16 F.3d 739 (7th Cir. 1994), held that a Chapter 13 trustee was entitled to modification of a confirmed plan pursuant to §1329, after some unsecured creditors failed to file claims, so as to increase the percentage payable to those creditors who did not file claims. Id. 16 F.3d at 744. The Witkowski court also held that the trustee was not barred by Res judicata, despite a lack of change in the debtor's financial situation. Id. 16 F.3d at 744-746. Finally, the Witkowski Court found that the Bankruptcy Judge did not err in finding that "cause" existed pursuant to §1329(c) for the plan to exceed 36 months, so that the debtor could provide a meaningful dividend to unsecured creditors. Id. 16 F.3d at 747 + NN. 12 and 13. Accord Barbosa v. Soloman, 235 F.3d 31, 41 (1st Cir. 2000). See also Lundin, Chapter 13 Bankruptcy, 3rd Ed. §239.3.

The decision in Witkowski, was decided prior to the enactment of §1325(b)(4) of BACPA, and while not directly on point as to the issue presently before the Court, clearly indicates that an improvement in the financial condition of the debtor postconfirmation , as result of an increase in income, a decrease in expenses, the acquisition of postconfirmation property, the failure of a creditor to file a claim, the denial of a claim, the change in the status of a secured creditor, or a lessor, to that of an unsecured creditor, or the amount of allowed claims is less than that estimated by the debtor, are all events that will permit the trustee or any unsecured creditor to move to increase payments on claims

pursuant to §1329(a)(1) and extend the time for such payments pursuant to §1329(a)(2). Accordingly, the rights accorded to a trustee or unsecured creditor under §1329 are consistent with the conclusion that an above-median family income debtor with negative monthly income should be required to file a plan with an applicable commitment period of five years.

It is also noted that two cases have been decided since this issue was briefed by the parties that have expressly held an above-median family income debtor with negative monthly disposable income had to propose a plan with a commitment period of 5 years in duration pursuant to §1325(b)(4) as a temporal requirement, where the debtor's plan did not provide for a 100% distribution to unsecured creditors. See In re Moose, 419 B.R. 632, 635, 636 (Bankr. E. D. Va. 2009); In re Meadows, 410 B.R. at 245-246. This Court agrees with the reasoning of these two Courts. As correctly observed by the Court in Meadows:

> [t]his court agrees with that line of cases that holds that the phrase "applicable commitment period" is a temporal requirement. It does so not only because it believes that this is the most intuitive reading of section 1325(b)(4), but because in this court's experience, such a construction has practical application in implement one of Congress's overarching purposes in enacting BAPCPA.
>
> It is axiomatic that by enacting BAPCPA, Congress sought to force "can-pay" debtors to pay something to their unsecured creditors. 151 Cong. Rec. S2470 (March 10, 2005).
>
> * * * *
>
> [v]iewing the phrase "applicable commitment period" as a temporal requirement is integral to implementing this congressional goal. If the "applicable commitment period" is a temporal requirement, then an above-median-income debtor must pay his debts in full or subject his net income to the claims of his creditors for a period of sixty months following the filing of his bankruptcy petition.
>
> * * * *
>
> Not only does this interpretation comport with what this court understands Congress to have intended by its enactment of an "applicable commitment period" in the first place, but it has practical application in many chapter 13 cases. The first and most obvious impact of a temporal requirement is its potential to preserve for the benefit of creditors upswings in the debtor's net income during the sixty-month term. Its impact

> is not limited, however, to enhancements of post-petition net income. For example, it is not unusual for a debtor to overpay his income taxes while he is in chapter 13. When he does so, he is entitled to a tax refund. Under this court's local procedures, tax refunds due to a chapter 13 debtor are paid to the chapter 13 trustee.
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> * * * *
>
> [c]lauses [§1325](b)(1) and [§1325](b)(4) are independent clauses. It is an accepted rule of construction that independent clauses have coordinate value. McLeod v. Nagle, 48 F.2d 189, 191 (9th Cir. 1931). This rule is violated if clause (b)(4) is made dependent upon clause (b)(1). Consequently, this court concludes that an "applicable commitment period" apples even in those cases in which the debtor has a projected disposable income of zero.

Id. 410 B.R. at 245-246.

> And as stated by the Court in In re Moose:
>
> [the] majority of reported cases treat the commitment period as a temporal requirement, not merely a multiplier.
>
> * * * *
>
> [a]llowing above-median income debtors to exit chapter 13 in less than five years deprives the trustee and creditors of the right to seek an increase in plan payments if the debtors' financial situation were to improve dramatically during that period. See §1329(a), Bankruptcy Code; Arnold v. Weast (In re Arnold), 869 F.2d 240 (4th Cir. 1989) (holding that bankruptcy court did not err in requiring increased monthly payment and extending plan period on creditor's motion after substantial unanticipated increase in debtor's income).

Id. 419 B.R. at 635-636 (footnotes omitted).

Accordingly, the Court concludes that notwithstanding the fact that the computations in the Debtors' B22C Statement produce a negative current monthly income, this does not permit them as above-median family income Debtors to have a 36 month plan confirmed, without paying all General Unsecured Nonpriority Claims in full. Part II of the B22C Statement based on historical data as of the Petition date, which reveals that the Debtors are above-median family income Debtors, is controlling and requires a 5 year commitment period, notwithstanding the fact that the Debtors'

B22C Statement shows a negative current monthly income. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Objection by the Trustee to the Plan of the Debtors should be and is hereby **SUSTAINED**. And it is further,

ORDERED, ADJUDGED, AND DECREED, that the Debtors file an Amended Plan with a five year applicable commitment periods within twenty-one (21) days of the entry of this Order, or the Court may dismiss or convert this case without further notice and hearing.

The Clerk shall enter the above Orders on a separate document.

April 15, 2010

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JUDGE, U. S. BANKRUPTCY COURT

Distribution:

Debtors
Attorney for Debtors
Attorney Godshalk
Trustee
U. S. Trustee